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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1128

RENN DRUM, JR., On Behalf of Himself and all Others Similarly Situated,

and

JESSE H. AUSTIN, JR., NORMAN C. DENNING, JOSEPH GRIMES, MRS. RUTH SHAW, DAVID BRADLEY, MRS. JAMES PROTHRO, HUGH M. WILSON, ROBERT S. METZGER, and MRS. DAVID I. FORT, *Appellants*,

v.

MALCOLM B. SEAWELL, Chairman of the North Carolina State Board of Elections; JOHN G. CLARK, MRS. ROBERT W. PROCTOR, HIRAM H. WARD and PAUL OSBORNE, Members of the North Carolina State Board of Elections, *Appellees*.

JURISDICTIONAL STATEMENT

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MALCOLM B. SEAWELL, Chairman of the North Carolina State Board of Elections; JOHN G. CLARK, MRS. ROBERT W. PROCTOR, HIRAM H. WARD and PAUL OSBORNE, Members of the North Carolina State Board of Elections, *Appellees*.

JURISDICTIONAL STATEMENT

This is an appeal by RENN DRUM, JR., the original plaintiff below, and by nine other persons, who had filed a Petition to Intervene as parties plaintiff, from an Order of the United States District Court for the

Middle District of North Carolina, which was entered on February 18, 1966, and found a legislative redistricting act unconstitutional under the rule of *Wesberry* v. *Sanders,* 376 U.S. 1, because of a failure to comply with the requirements of Section 2 of Article I of the Constitution of the United States, but nevertheless refused to enjoin the application of such legislative enactment. The Appellants also appeal from the further Order of the United States District Court for the Middle District of North Carolina entered on March 8, 1966, denying the Petition for Rehearing which had been submitted by these Appellants, in light of *Swann* v. *Adams* (Number 973),—decided on February 25, 1966 by This Honorable Court after the earlier Order. This statement is submitted to show that the Supreme Court has jurisdiction of this appeal, and that important questions requiring immediate action by this Court are presented.

OPINIONS BELOW

The two Orders appealed from are unreported. An earlier opinion in this case rendered by the Court below on November 30, 1965, is also unreported. Copies of the Opinion and Order of the Court below, dated February 18, 1966; its Order of March 8, 1966 denying the rehearing; and its earlier Opinion and Order, dated November 30, 1965, are printed herein as Appendices A-1, A-2, and A-3, respectively.

JURISDICTION

This suit was filed on September 10, 1965, pursuant to Title 42, U.S.C., Sections 1983 and 1988 and Title 28, U.S.C., Section 1343. Relief was also sought pursuant to Title 28, U.S.C., Sections 2201 and 2202.

Under the provisions of Title 28, U.S.C., Section 2281, a three-judge court was invoked. This appeal is from an Order of the District Court entered February 18, 1966, and a later Order, dated March 8, 1966, denying a Petition for Rehearing. Notice of Appeal by Appellant Drum was filed in the District Court on March 11, 1966; and the other Appellants joined in his appeal. The jurisdiction of the Supreme Court to review the Orders of the District Court is conferred by Title 28, U.S.C., Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review on direct appeal the judgment in this case: *Swann* v. *Adams* (Number 973), decided February 25, 1966; *Wesberry* v. *Sanders,* 376 U.S. 1; *Reynolds* v. *Sims,* 377 U.S. 533; *Baker* v. *Carr,* 369 U.S. 186.

STATUTES INVOLVED

Directly involved are the provisions of Chapter 7, 1966 Extra Session Laws, enacted by the General Assembly of North Carolina on January 14, 1966, and which became law on February 15, 1966. This act, which rewrote General Statutes 163-103, is reprinted herein as Appendix B.

QUESTIONS PRESENTED

1. Where in November, 1965, the District Court found the North Carolina law governing districts for the United States House of Representatives to be constitutionally invalid and allowed the State until January 31, 1966, to correct the invalidity, stating that the Court would itself devise a valid plan if the Legislature did not, and the Legislature in special session then adopted a plan which the District Court again expressly found constitutionally invalid, did the Dis-

trict Court have any further discretion to delay a constitutionally valid redistricting plan in North Carolina, and thus to prevent legally apportioned representation in the United States Congress until 1969?

2. May the District Court permit the election of members of Congress in 1966 under a redistricting plan which the Court has held to be constitutionally defective and in violation of Article 1, Section 2, of the United States Constitution, and which defective plan is the second successive plan from the North Carolina General Assembly found to be unconstitutional by the same District Court?

3. Does the refusal of the District Court to enjoin the holding of elections in November, 1966, under a plan which it has found to be constitutionally defective and its refusal to provide a valid redistricting plan for such elections deny to Plaintiff Drum (and all others similarly situated) his rights under Article 1, Section 2, of the United States Constitution and due process of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

4. Does the decision of the District Court to leave in effect until January, 1969, a plan of congressional redistricting, which is the product of a special session of the North Carolina General Assembly, but which has been held by the District Court to be invalid, deny to Plaintiff Drum (and all others similarly situated) his rights under Article 1, Section 2, of the United States Constitution and due process of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

5. Does the Court have discretion to leave in effect even on an interim basis, a constitutionally defective plan for congressional redistricting, which defective plan is the second successive plan from the North Carolina General Assembly expressly found to be unconstitutional by the District Court?

6. Did the Court below have discretion to deny intervention in this class action, after all the parties had filed written notice that they did not object to such intervention, and when the uncontradicted allegations of the Petition to Intervene justified intervention of right under Rule 24(a), Federal Rules of Civil Procedure?

STATEMENT OF THE CASE

On September 10, 1965, Appellant Drum filed an action seeking a redistricting of the congressional districts in North Carolina and also seeking reapportionment of both houses of the North Carolina General Assembly in accordance with Constitutional requirements. After final hearing the District Court on November 30, 1965, found:

> "There are eleven districts and the proportional representation per district is 414,196 persons. We note that six of the eleven districts vary from the average by more than 10 per cent; four by more than 15 per cent, and only two districts are within 5 per cent of the average. The smallest district in population (the first) contains 136,335 less than the average while the largest (the eight) contains 77,265 more than the average. No valid explanation is offered to justify these glaring discrepancies, if indeed they could be justified. We agree with the statement in the Amicus brief that the minimum controlling percentage is not significant.

We are concerned with the population variance ratio of 1.8 to 1. Such a variance cannot be justified. In *Wesberry* v. *Sanders,* 376 U.S. 1 (1964), the Court said:

> 'We hold that, construed in its historical context, the command of Art. I § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.'

"Because of the unconstitutionally discriminatory apportionment embodied therein, we hold the statute (N.C.G.S. 163-103) creating the several districts for the purpose of selecting representatives to the Congress of the United States to be null and void."

In light of its finding, the Court concluded:

"We cannot allow the regularly scheduled 1966 primaries and elections to proceed under laws now held to be invalid. We recognize, however, that it is fit and proper that the Legislature of this State should be given an opportunity to rectify the inequities which exist before this court should undertake to do so. Ample time now exists before the primary scheduled for May 28, 1966, for the Governor to call a special session of the Legislature. We will, therefore, stay the mandate of our injunction until January 31, 1966, in order that such a session may be convened. If apportionment compatible to constitutional standards cannot be achieved by that date this court will regretfully undertake to fashion a scheme of apportionment which will permit the 1966 primaries and elections to proceed on a just and equitable basis."

A special session of the North Carolina General Assembly was then convened, which enacted a redistrict-

ing plan for the congressional districts and a reapportionment plan for each house of the General Assembly. The Appellees thereupon moved to dismiss the action on the ground that the relief requested had been provided. Appellant Drum did not resist the motion to dismiss insofar as his suit pertained to reapportionment of the State Legislature; however, he opposed the motion insofar as it pertained to congressional redistricting and requested that the Court retain jurisdiction. Moreover, nine other persons petitioned the Court below for leave to intervene as parties plaintiff in the plaintiff's class action in order that they might also oppose the motion to dismiss insofar as it pertained to congressional redistricting. The other parties to the litigation filed written statements that they did not object to the requested intervention.

After receiving briefs and hearing argument, the District Court concluded that the reapportionment of the General Assembly conformed to the Constitution; however, with respect to the redistricting, it was the Court's opinion that:

> "The tortuous lines which delineate the boundaries of many of the congressional districts under the proposed plan, the resulting lack of compactness and contiguity, and failure to achieve equal representation for equal numbers of people as nearly as practicable compels us to hold that the congressional apportionment is constitutionally invalid."

Insofar as a remedy for the constitutional invalidities was concerned the Court stated:

> "While we feel bound to reject the plan, we nevertheless recognize the good faith effort of the Legislature to bridge the tremendous gulf which existed

between the status quo and the constitutional requirements. We also recognize the obligation of the federal courts to defer to the prerogative of the legislative branch of the State in this field. Recognizing also the imminence of the 1966 primaries we, in the exercise of our equitable discretion, will stay our mandate further and permit the congressional elections of 1966 to take place under the laws passed by the special session. We will, however, retain jurisdiction of the case, to assure that no further congressional elections will be held under the plan which does not fully meet constitutional requirements in order to give the reapportioned Legislature of 1967 an opportunity to reconsider the matter." *Reynolds* v. *Sims,* 377 U.S. 533, 586-587."

In its Order on motion to dismiss, the Court below ordered:

"That the Act of the 1966 Special Session of the General Assembly in redistricting the State for the election of members of the Congress of the United States is not in compliance with the Constitution, but the mandate of this court with respect thereto will be stayed by reason of special circumstances."

"That the primaries and the general election of 1966 of members of the North Carolina General Assembly and of the Congress may be held in conformity with the Acts of the 1966 Special Session of the General Assembly."

"That the motion to dismiss is denied, and this Court will retain jurisdiction of the matter until after the regular session of the 1967 General Assembly shall have had an opportunity to act upon the matter of congressional redistricting, but not later than July 1, 1967, when the case may be reopened either upon the Court's own motion or upon application of any party to this suit."

A week later, the decision in *Swann* v. *Adams* (Number 973), was rendered by the Supreme Court. Thereupon, the Appellants submitted Petitions for Rehearing with respect to the remedy selected by the Court below in its Order of February 18, 1966. The Appellants sought relief from the Court below whereby the 1966 congressional elections might be conducted under a redistricting plan which was in compliance with the Constitution. The Court below concluded that it could "find no reason to justify reopening this case at this time"; and it denied the motion for rehearing. The net result of the two Orders appealed from is that not until January, 1969, will these Appellants and the other citizens of North Carolina be represented in the United States Congress by representatives who have been elected in compliance with the Constitution of the United States.

THE QUESTIONS ARE SUBSTANTIAL

The refusal of the District Court to enjoin the use of a redistricting plan, which is constitutionally invalid, and allowing that constitutionally invalid plan to remain in effect for future elections repudiate the principles of Swann v. Adams and Reynolds v. Sims

Appellant Drum began this litigation in September, 1965. At that time, no election machinery was in operation; the next elections were some fourteen months in the future; and the next primaries were more than eight months away. When the Court below rendered its initial opinion in the case, the elections were still more than eleven months off; and at that time, the Court below provided in its Order:

> "That if the Legislature does not act, or if its acts do not meet the determination herein made, then the court will fashion a scheme of apportionment

which will permit the 1966 primaries and elections to proceed on a just and equitable basis."

At this point, the Appellees and the Legislature were on notice both with respect to their duty and with respect to the time factors involved.

Despite the duty to provide a constitutionally valid redistricting plan, which would provide the parties to this litigation—and all other citizens of North Carolina—their rights assured under Section 2 of Article I of the United States Constitution, the Legislature failed to provide a constitutionally valid plan. One reason for this failure was "the conceded rationale of the Legislature to protect incumbents by placing them in different districts and by changing the existing districts as little as necessary to bring the plan within presumed minimum acceptable mathematical percentages." In other words, a chief reason for the failure was the effort by the Legislature to shield the beneficiaries of the constitutionally invalid districting plan which had been initially attacked by Appellant Drum and thereby to maintain the status quo as much as possible.

Although in its Order of November 30, 1965 the Court had placed the Legislature on notice that "if its acts do not meet the determinations herein made, then the Court will fashion a scheme of apportionment which will permit the 1966 primaries and elections to proceed on a just and equitable basis", the Court below, on February 18, 1966, retreated from its prior position. Even though it found that the "act of the 1966 Special Session of the General Assembly in redistricting the State for the election of members of the Congress of the United States is not in com-

pliance with the Constitution", the Court stayed its mandate.

In *Reynolds* v. *Sims,* this Honorable Court stated:

> "It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."

Although the Court then was discussing legislative reapportionment, there is no reason to believe that the requirements as to congressional redistricting are any less stringent. See *Wesberry* v. *Sanders,* 376 U.S. 1; and *Reynolds* v. *Sims,* 377 U.S. 533.

The Court recognized, in *Reynolds* v. *Sims,* 377 U.S. 533, 585-587, that:

> ". . . Under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid."

However, it seems clear from the Court's holding in *Swann* v. *Adams* (number 973), decided February 25, 1966, that a State cannot delay in formulating a constitutionally valid plan and then use that very delay as a means to justify the use of an interim plan—which will involve further delay.

The Appellants were not responsible for any delays in this case; they did not wish to procrastinate in vindicating their constitutional rights. The State

Legislature, which had not complied with constitutional requirements when it enacted General Statutes Section 163-103 in 1961, was given a second chance in its special session in January, 1966. Again, it failed to meet constitutional norms. It would seem clear that "one bite" is enough.

In its Order of November 30, 1965, the Court below informed the Legislature that if it failed to meet constitutional requirements, then the Court would fashion a scheme of reapportionment that would "permit the 1966 primaries and elections to proceed on a just and equitable basis." The Legislature was not informed that it need make only a "good faith effort" to meet constitutional requirements. Indeed, good faith efforts are generally not sufficient when constitutional rights are involved; it is the result which counts.

In Florida, use of the interim plan which had been proposed by the Florida Legislature would have resulted in the denial of practical relief until April, 1969. This being so, the Supreme Court granted relief, even though its opinion was handed down only some four days before the filing date for the Florida primaries and only a little more than two months before the primary date itself.

In the present case, the use of an interim plan would delay practical relief until January, 1969, when the new representatives would be sworn in who had been elected in 1968. Moreover, further litigation might be necessary in 1967, depending on the extent of the redistricting efforts that might be made in 1967 by the General Assembly.

The Appellants filed petitions for rehearing on Monday, February 28, 1966—almost immediately after

learning of the opinion in *Swann* v. *Adams*, and more than two weeks prior to the filing date for the North Carolina primaries, which is scheduled to take place on May 28, 1966. There is no imminence of elections of the type that was envisaged by the Supreme Court in *Reynolds* v. *Sims*. Even if the State of North Carolina failed to take action to delay the primary, it is still possible at this time for prompt judicial action to be taken which would allow the primaries to proceed on May 28, 1966. To the extent that "equitable considerations" are to be relied on in the vindication of Appellants' constitutional rights, it is well to recall that they, rather than defendant Appellees, come into Court with "clean hands".

In emphasizing that "justice delayed is justice denied", the Appellants rely especially on the words of the Court in *Swann* v. *Adams* that:

> "The effect of the District Court's decision is to delay effectuation of a valid apportionment in Florida until at least 1969. While recognizing the desirability of permitting the Florida Legislature to itself determine the course of reapportionment, we find no warrant for perpetuating what all concede to be an unconstitutional apportionment for another three years. We reverse and remand to the District Court so that a valid reapportionment plan will be made effective for the 1966 elections."

Similarly, the Court below should have adopted a remedy that would provide a valid redistricting plan for the congressional elections in 1966. There is still ample time for relief before the November, 1966 elections. And it is an understatement to say that a substantial question is presented when the issue concerns

the timely implementation of voting rights for which the Founding Fathers bled and died.

ABUSE OF DISCRETION

For the reasons just discussed, to deprive North Carolina's entire population of constitutionally selected representation in the Congress until January 1969 cannot be justified as within the scope of reasonable discretion.

CONCLUSION

For the reasons stated, this Court has jurisdiction of this action and should reverse the Orders below and order the District Court to compel a redistricting of the State of North Carolina in a manner consistent with the Constitution of the United States.

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APPENDIX

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Appendix A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

No. C-168-WS-65

RENN DRUM, JR., on Behalf of Himself and All Others Similarly Situated, *Plaintiff*,

v.

MALCOLM B. SEAWELL, Chairman of the North Carolina State Board of Elections; JOHN G. CLARK, MRS. ROBERT W. PROCTOR, HIRAM H. WARD, and PAUL OSBORNE, Members of the North Carolina State Board of Elections, *Defendants*.

G. Ray Motsinger, of Winston-Salem, North Carolina, for the Plaintiff.

T. Wade Bruton, Attorney General of North Carolina, James F. Bullock, Assistant Attorney General, of Raleigh, North Carolina, and H. S. Merrell and Thomas L. Young, of Rocky Mount, North Carolina, for the Defendants.

R. Mayne Albright, of Raleigh, North Carolina, Charles F. Lambeth, Jr., of Thomasville, North Carolina, James Mattocks, of High Point, North Carolina, McNeill Smith, of Greensboro, North Carolina, Ralph M. Stockton, Jr., of Winston-Salem, North Carolina, William L. Thorp, Jr., of Rocky Mount, North Carolina, and Joseph W. Grier, Jr., of Charlotte, North Carolina, for North Carolina Chapter American Civil Liberties Union, *Amicus Curiae*.

Before J. SPENCER BELL, United States Circuit Judge EDWIN M. STANLEY, United States District Judge, and ALGERNON L. BUTLER, United States District Judge.

J. SPENCER BELL, Circuit Judge:

On November 30, 1965, this court entered an interlocutory Order holding that the apportionment of the State

for the election of members of the State Legislature and representatives to the Congress was unconstitutionally discriminatory and therefore void. Further elections were enjoined, but the court's mandate was stayed in order that the State might act.

Subsequent to the date of the court's order, the General Assembly of North Carolina met in special session and reapportioned the State. We commend the Legislature and its leaders for the expeditious and efficient manner in which they have sought to accomplish a very burdensome and complex task.

Counsel for the defendants move that this action be dismissed on the grounds that the State is now properly apportioned.

On February 1, 1966, three days before the scheduled hearing on the State's motion to dismiss, several petitioners,[1] residents and taxpayers of North Carolina, petitioned to intervene to oppose the State's motion. Because of the urgency of time, with the consent of counsel for all parties, we have in the exercise of our discretion denied the petitioners the right of formal intervention. We have, however, accepted their brief and have heard their counsel in oral argument.

We have examined the acts by which the Legislature has reapportioned the membership of the two houses. We hold that these acts meet the minimum federal constitutional standards.[2] The apportionment of the Senate re-

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[1] Jesse H. Austin, Jr., Norman C. Denning, Joseph Grimes, Mrs. Ruth Shaw, David Bradley, Mrs. James Prothro, Hugh M. Wilson, Robert S. Metzer and David I. Fort.

[2] The Senate has been reapportioned into multi-member districts consisting of one-, two-, and three-member districts, ranging in total population from 79,373 to 308,017. Article 2, Section 4, of the North Carolina Constitution, provides that "each Senate *district* shall contain, as nearly as may be, an equal number of inhabitants

sults in a minimum controlling percentage of 48.80 per cent and a population variance ratio of 1.32 to 1. The minimum controlling percentage for the House of Representatives if 47.54 per cent and the population variance ratio is 1.33 to 1. The disparities in population reflected by these figures are not so extreme as to violate constitutional requirements, taking the peculiar interests of the State and its geographic composition into consideration.

Within the limitations imposed by county lines, the districts for both the State House and Senate appear to be reasonably compact. In a number of instances, slight over-representation in one house is balanced by under-representation in the other, though this is regrettably not true with respect to the eleven counties lying in the northeast corner of the State and with respect to Guilford, Halifax, and Watauga counties. While these latter deviations and disparities render the apportionment scheme of the two houses, considered as a whole, "constitutionally suspect," we cannot say that they constitute invidious discrimination. *Lucas* v. *Colorado Gen. Assembly,* 377 U.S. 713 n. 27 (1964). We assume that when the houses of the Legislature are reapportioned following the 1970 decennial census the last vestige of unequal representation will be removed. We point out again that any deviation from a strict population basis in one house of the Legislature should be compensated for in the other house to the end that "as nearly as practicable" one man's vote will "be worth as much as another's." *Wesberry* v. *Sanders,* 376 U. S. 1 (1964).

We cannot, however, hold that the Congressional redistricting plan fulfills the constitutional requirement that

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* * *" [Emphasis supplied.] Plaintiff makes no claim that the Act violates the State Constitution. Whether the Senate plan violates the North Carolina Constitution is a matter primarily for the state courts; it is not before us in this case. See *Fortson* v. *Dorsey,* 379 U.S. 433 (1965).

the districts be of ". . . as nearly . . . equal population as is practicable." *Reynolds* v. *Sims,* 377 U.S. 533, 577 (1963). As is further pointed out in *Reynolds,* stricter adherence to equality of population between districts may logically be required in congressional than in state legislative representation. While rigid mathematical standards are not the sine quo non of constitutional validity, practical and rational equality is required. Such equality recognizes only minor deviations which may occur in the recognition of rational and legitimate factors, free from the taint of arbitrariness, irrationality and discrimination. *Roman* v. *Sincock,* 377 U.S. 695, 710 (1964). The overemphasis on factors other than population has created excessive deviation from the standard thus required. Any deviation from that standard must be rationally justified. The greater the disparity, of course, the greater is the burden.

The conceded rationale[3] of the Legislature to protect incumbent congressmen by placing them in different districts and by changing the existing districts as little as necessary to bring the plan within presumed minimum acceptable mathematical percentages causes us to conclude that the plan does not come "as nearly as practicable to equal population." The greater population variations which were created by the Legislature in the first, third and seventh districts by their deviation from the plan as origi-

---

[3] Prior to the convening of the extra session of the General Assembly, the Speaker of the House of Representatives and the President of the Senate appointed a Joint Select Committee composed of 24 members from each body to draft a plant of congressional redistricting and reapportionment. One of the Committee's criteria to be followed in formulating its plan is as follows:

> "It has been the Committee's firm resolve to avoid the placing of incumbents in the same new district if at all compatible with the equal population objective."

nally submitted by the select committee[4] is further indicative of overemphasis of these factors. It is not necessary to a decision of this case to determine whether a motive to retain incumbent congressmen is a legitimate consideration in redistricting. We simply hold that it may not predominate over the requirements of practicable equality, and we think that compactness and contiguity are aspects of practicable equality.

The tortuous lines which delineate the boundaries of many of the congressional districts under the proposed plan, the resulting lack of compactness and contiguity, and the failure to achieve equal representation for equal numbers of people as nearly as practicable compels us to hold that the congressional apportionment is constitutionally invalid.[5]

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[4] The Committee's plan, while lacking in compactness of territory and contiguity, achieved a population variance ratio of 1.10 to 1. The deviations from the ideal of 414,196 persons per congressman range from minus 3.50 per cent to plus 6.15 per cent, and the average deviation for all districts is 1.96 per cent. The difference between the population of the largest and smallest district is 39,954.

The General Assembly adopted the Committee's plan after making two changes which did not affect its "firm resolve" to avoid the placing of any two incumbents in the same district. The plan as adopted which is submitted to this court for approval effects a population variance ratio of 1.19 to 1; a deviation of persons per congressman ranging from minus 8.91 per cent to plus 8.39 per cent; and average deviation for all districts of 3.46 per cent, and a population difference between the largest and smallest district of 71,640.

[5] Commenting on congressional apportionment in Alabama, the Supreme Court said: "Furthermore, the existing apportionment, and also to a lesser extent the apportionment under the Crawford-Webb Act, presented little more than crazy quilts completely lacking in rationality, and could be found invalid on that basis alone." *Reynolds* v. *Sims*, 377 U.S. 533, 568, 84 S. Ct. 1362, ...

While we feel bound to reject the plan, we nevertheless recognize the good faith effort of the Legislature to bridge the tremendous gulf which existed between the status quo and the constitutional requirements. We also recognize the obligation of the federal courts to defer to the prerogative of the legislative branch of the State in this field. Recognizing also the imminence of the 1966 primaries, we, in the exercise of our equitable discretion, will stay our mandate further and permit the congressional elections of 1966 to take place under the laws passed by the special session. We will, however, retain jurisdiction of the case, to assure that no further congressional elections will be held under the plan which does not fully meet constitutional requirements in order to give the reapportionment Legislature of 1967 an opportunity to reconsider the matter. *Reynolds* v. *Sims*, 377 U.S. 533, 586-587.

Jurisdiction of this matter is retained.

An order will be entered in accordance herewith.

/s/ J. SPENCER BELL
United States Circuit Judge

/s/ EDWIN M. STANLEY
United States District Judge

/s/ ALGERNON L. BUTLER
United States District Judge

February 18, 1966

Order on Motion to Dismiss

Upon consideration of the pleadings, brief and arguments of parties and *amici curiae*, it is ORDERED:

1. That the motion to make additional parties is denied.

2. That the Acts of the 1966 Special Session of the General Assembly in reapportioning the Senate and the House of Representatives of North Carolina are in sufficient con-

formity with the requirements of the Constitution of the United States that no further consideration of that matter will be given in this action.

3. That the Act of the 1966 Special Session of the General Assembly in redistricting the State for the election of members of the Congress of the United States is not in compliance with the Constitution, but the mandate of this court with respect thereto will be stayed by reason of special circumstances.

4. That the primaries and the general election of 1966 of members of the North Carolina General Assembly and of the Congress may be held in conformity with the Acts of the 1966 Special Session of the General Assembly.

5. That the motion to dismiss is denied, and this Court will retain jurisdiction of the matter until after the regular session of the 1967 General Assembly shall have had an opportunity to act upon the matter of congressional redistricting, but not later than July 1, 1967, when the case may be reopened either upon the court's own motion or upon application of any party to this suit.

Dated this 18th day of February, 1966.

/s/ J. Spencer Bell
United States Circuit Judge

/s/ Edwin M. Stanley
United States District Judge

/s/ Algernon L. Butler
United States District Judge

Appendix A-2

Order on Motion for Rehearing

Motion is made to rehear and reconsider this Court's order of February 18, 1966, in the above cause wherein the said Court found that the Act of the 1966 Special Session of the General Assembly of North Carolina in redistricting the State for the election of members of the Congress was not in compliance with the Constitution, but stayed the mandate of the Court with respect thereto until not later than July 1, 1967.

The movants herein contend that the stay of the Court's mandate to redistrict is inconsistent with the decision of the Supreme Court of the United States in *Swann, et al* v. *Adams, et al*, (Supreme Court No. 973, February 25, 1966). We have carefully considered the per curiam decision of the Court in that case. We find nothing therein which would justify reopening this case under the special circumstances here existing. It is clear from the opinion in *Swann* that that case had been pending since 1962; that the Legislature had two separate opportunities during which it had failed properly to reapportion the state and that the opinion of the Supreme Court in effect concluded that the District Court had abused its equitable discretion in further extending the time. No such circumstances exist here.

Suit in this case was filed on September 11, 1965, a hearing was held on November 24, 1965, and an interlocutory order entered on November 30, 1965, requiring the Legislature to reapportion and redistrict the State before January 31, 1966. The Legislature convened promptly in special session and acted well before the deadline. This Court reconvened on February 4, 1966, and promptly thereafter on February 18, 1966, entered its order requiring redistricting of the Congressional districts but staying its mandate until July 1, 1967, because of the immediacy of the 1966 primary elections.

Upon careful consideration of the brief filed herein and of the briefs and records in the *Swann* case we find no reason to justify reopening this case at this time.

IT IS, THEREFORE, ORDERED that the motion for rehearing be denied.

/s/ J. SPENCER BELL
United States Circuit Judge

/s/ EDWIN M. STANLEY
United States District Judge

/s/ ALGERNON L. BUTLER
United States District Judge

March 8, 1966

Appendix A-3

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

No. C-168-WS-65

RENN DRUM, JR., on Behalf of Himself and All Others Similarly Situated, *Plaintiff*,

v.

MALCOLM B. SEAWELL, Chairman of the North Carolina State Board of Elections; JOHN G. CLARK, MRS. ROBERT W. PROCTOR, HIRAM H. WARD, and PAUL OSBORNE, Members of the North Carolina State Board of Elections, *Defendants*,

and

D. S. SWAIN, JR., *Plaintiff-Intervenor*.

G. Ray Motsinger, of Winston-Salem, North Carolina, for the Plaintiff.

T. Wade Bruton, Attorney General of North Carolina, James F. Bullock, Assistant Attorney General, of Raleigh,

North Carolina, and H. S. Merrell and Thomas L. Young, of Rocky Mount, North Carolina, for the Defendants.

John A. Wilkinson and James R. Vosburgh, of Washington, N. C., for Plaintiff-Intervenor.

R. Mayne Albright, of Raleigh, North Carolina, Charles F. Lambeth, Jr., of Thomasville, North Carolina, James Mattocks, of High Point, North Carolina, McNeill Smith, of Greensboro, North Carolina, Ralph M. Stockton, Jr., of Winston-Salem, North Carolina, William L. Thorp, Jr., of Rocky Mount, North Carolina, and Joseph W. Grier, Jr., of Charlotte, North Carolina, for North Carolina Chapter American Civil Liberties Union, *Amicus Curiae*.

Before J. SPENCER BELL, United States Circuit Judge, EDWIN M. STANLEY, United States District Judge, and ALGERNON L. BUTLER, United States District Judge.

J. SPENCER BELL, Circuit Judge:

This action is brought by the plaintiff, Renn Drum, Jr., a citizen of North Carolina and a registered voter, on behalf of himself and others similarly situated against the Chairman and members of the North Carolina Board of Elections. He alleges invidious discrimination against himself and others so situated in the manner in which the State has been apportioned for the election of members of the two Houses of the State Legislature and of the United States House of Representatives. The action seeks a declaratory judgment holding Article II, Sections 5 and 6, of the North Carolina Constitution and the Acts apportioning the State to be unconstitutional and an injunction forbidding further elections until the Legislature shall properly apportion and if the Legislature fails properly to apportion within a specified time, that the court then do so itself. During the pendency of the action, D. S. Swain, Jr., moved for leave to file a complaint in intervention for the purpose of seeking an injunction against the holding of a special primary and election to fill a

vacancy existing in the First Congressional District. The intervention was allowed.

The parties to the action have stipulated the facts with respect to the geographical areas, the population and the representation of each of the districts and counties into which the State is divided for the purposes of electing State Senators and Representatives and United States Representatives. The court finds the facts to be as stipulated with respect to these statistics and data, copies of which are appended.

The defendants concede that the complaint states a cause of action. *Baker* v. *Carr*, 369 U.S. 186 (1962); 42 U.S.C. §§ 1983 and 1988; U.S. Const. Amend. XIV. Jurisdiction is vested in this court under 28 U.S.C. § 1343 (3) and the declaratory judgment act, 28 U.S.C. § 2201.

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the Supreme Court laid down guide lines to assist the lower courts in implementing the constitutional guaranties of sufferage. The Equal Protection Clause requires substantially equal representation for all citizens in a state in each of the two Houses of a state bicameral Legislature. This right may not be debased by weighing votes differently according to where a citizen happens to reside. Representation in state legislative bodies must be, as nearly as practicable, apportioned on districts of equal population though mechanical exactness is not required. Political subdivisions may be recognized but not at the cost of substantial equality among the several districts. Considerations of history, economic or other group interests or area alone do not justify substantial deviations from the equal population concept Nor will the presence of large numbers of military and military related personnel justify the underrepresentation of an area. "Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible." *Davis* v. *Mann*, 377 U.S. 678, 691 (1964).

The court, while rejecting a rigid application of a mathematical formula, has laid down two statistical tests in evaluating the State's "honest and good faith effort to construct districts, . . . as nearly of equal population as is practicable." First, the *minimum controlling precentage;* i.e., the percentage of the State's population which resides in the least populous districts which can elect a majority of each House; and second, the *population variance ratio;* i.e., the ratio between the most populous district and the least populous district of the State.

We turn to the congressional districting of the State. There are eleven districts and the proportional representation per district is 414,196 persons. We note that six of the eleven districts vary from the average by more than 10 per cent; four by more than 15 per cent, and only two districts are within 5 per cent of the average. The smallest district in population (the first) contains 136,335 less than the average while the largest (the eighth) contains 77,265 more than the average. No valid explanation is offered to justify these glaring discrepancies, if indeed they could be justified. We agree with the statement in the Amicus brief that the minimum controlling percentage is not significant. We are concerned with the population variance ratio of 1.8 to 1. Such a variance cannot be justified. In *Wesberry* v. *Sanders,* 376 U.S. 1 (1964), the Court said:

> "We hold that, construed in its historical context, the command of Art. I § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."

Because of the unconstitutionally discriminatory apportionment embodied therein, we hold the statute (N.C.G.S. 163-103) creating the several districts for the purpose of

selecting representatives to the Congress of the United States to be null and void.

The Constitution of North Carolina (Art. II, §§ 5 and 6) provides that the House of Representatives shall consist of 120 members and that each of the State's counties shall have at least one representative "although it may not contain the requisite ratio of representation." The remaining 20 are to be divided among the more populous counties. The House is now apportioned in accordance with this requirement. The proportional representation in the House is one member per 37,968 persons. The member from Wayne County has 82,059 constituents and the member from Tyrrell 4,520. A population variance of 18.2 to 1. Sixty-one of the least populous counties having a population of 1,234,325 can elect a majority of the House. Thus the minimum controlling percentage is 27.1%. These variances are too great to be acceptable. *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Lucas* v. *Forty-Fourth General Assembly,* 377 U.S. 713 (1964); *Davis* v. *Mann,* 377 U.S. 678 (1964); *Harris* v. *Anderson,* 194 Kan. 302, 400 p. 2d 25, cert. denied, ... U.S. .... We cannot accept the State's argument that this formula has been in the Constitution since 1836 and that the State re-entered the Union with the formula in effect. *Reynolds* v. *Sims, supra.* We note, however, that when the formula originally took effect the State had 65 counties, leaving 55 memberships in the House to be apportioned. Today with 100 counties only 1/6 of the House remains to be apportioned among the most populous counties. North Carolina has no provisions for initiative and referendum; its Governor has no veto power, thus the people of the State have no practical means by which to rectify an imbalance of representation in one of the most powerful legislative bodies in America.

We hold that the provisions of the State Constitution requiring that each county be afforded at least one Representative regardless of its population and the implementing

statute (N.C.G.S. 120-2) to be in violation of the Equal Protection provisions of the Fourteenth Amendment and therefore null and void.

The North Carolina Constitution, Article II, Section 4, requires the General Assembly to alter the senatorial districts after the return of every census so that each district, as nearly as may be, shall have an equal number of inhabitants. Pursuant to this mandate, the 1963 Act (N.C.G.S. 120-1) apportioned the fifty Senators among 36 districts of the State. An examination of the evidence shows that each of the fifty Senators should ideally represent 91,123 persons; that the smallest district in terms of population contains 65,722 persons and the three largest, respectively, 123,260, 127,074, and 148,418. We note that the minimum controlling percentage is 47.1 and the population variance ratio: 2.3 to 1.

We note that every one of the counties in the five most overrepresented senatorial districts is also overrepresented in the House and that the seven most overrepresented counties in the House are included in the three most overrepresented senatorial districts.

While we note that the apportionment of the Senate is far more nearly equitable than that of the House, we may not validate either body in the abstract since it must be considered in relation to the other branch of the legislative body as it is finally apportioned.

> "... the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the state's voters, in both houses of a bicameral state legislature." *Maryland Committee* v. *Tawes,* 377 U.S. 656, 673 (1964).

We hold that the apportionment of the Senate as it now exists is not sufficiently grounded on population to be constitutionally sustainable. N.C.G.S. 120-1 is therefore held

to be null and void. *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964). Counsel for the State has urged this court to furnish in its opinion as much guidance as possible to the Legislature, should we find it necessary to require reapportionment. In conformity with this request we point out that the variance ratio between the three highest districts and the remainder of the State is on its face unjustifiable in the light of the fact that the remainder of the State could be apportioned on a population variance of only 1.3 to 1. The obligation of the State is to apportion as nearly equally as possible on a population based representation, and even minor deviations must be free from any taint of arbitrariness or discrimination. *Roman* v. *Sincock*, 377 U.S. 695 (1964).

The plaintiff having proven his charge of discrimination on the basis of population by evidence to which the parties have stipulated, the burden was placed upon the defendants to justify the variations from this standard which were shown to exist. The defendants have failed to meet this burden and we are forced to the conclusion that the plaintiff and those in his class are entitled to relief. *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E.D. Va. 1962). We will enter a judgment declaring the invalidity of the pertinent State constitutional and statutory provisions.

We cannot allow the regularly scheduled 1966 primaries and elections to proceed under laws now held to be invalid. We recognize, however, that it is fit and proper that the Legislature of this State should be given an opportunity to rectify the inequities which exist before this court should undertake to do so. Ample time now exists before the primary scheduled for May 28, 1966, for the Governor to call a special session of the Legislature. We will, therefore, stay the mandate of our injunction until January 31, 1966, in order that such a session may be convened. If apportionment compatible to constitutional standards cannot be achieved by that date this court will regretfully under-

take to fashion a scheme of apportionment which will permit the 1966 primaries and elections to proceed on a just and equitable basis. We think that the right of the people of the First Congressional District to be represented in the Congress during the interval which must intervene while adequate consideration is given to a statewide reapportionment of our Congressional representation, requires us to decline to interfere with the special election which has been called to fill the vacancy in that District.

Jurisdiction in this matter is retained.

An order will be entered in accordance herewith.

/s/ J. SPENCER BELL
United States Circuit Judge

/s/ EDWIN M. STANLEY
United States District Judge

/s/ ALGERNON L. BUTLER
United States District Judge

November 30, 1965.

APPENDIX TO OPINION

CONGRESSIONAL DISTRICTS—11

Proportional Representation Per District = $\frac{4,556,155}{11} = 414,196$

Minimum Controlling Percentage—48.6
Population Variance Ratio—1.8 to 1

District	Population in District	Percent of State's Total Population	Population Shortage for Apportioned Representation	Population Excess for Apportioned Representation	Percent of *Over* or *Under* Representation
No. 1	277,861	6.099	136,335		+32.9
No. 2	350,135	7.685	64,061		+15.5
No. 3	430,360	9.446		16,164	— 3.9
No. 4	460,795	10.114		46,599	—11.3
No. 5	454,261	9.970		40,065	— 9.7
No. 6	487,159	10.692		72,963	—17.6
No. 7	448,933	9.853		34,737	— 8.4
No. 8	491,461	10.787		77,265	—18.7
No. 9	404,093	8.869	10,103		+ 2.4
No. 10	390,020	8.560	24,176		+ 5.8
No. 11	361,077	7.925	53,119		+12.8

HOUSE OF REPRESENTATIVES—100 COUNTIES WITH 120 MEMBERS

Proportional Representation Per Member = $\frac{4,556,155}{120} = 37,968$

Minimum Controlling Percentage—27.1
Population Variance Ratio—18.2 to 1

County	Population	Number of Representatives in House	Population Per Apportioned Representative	Population Change to Give Equal Representation	
				Shortage	Excess
Alamance	85,674	2	42,837		4,869
Alexander	15,625	1	15,625	22,343	
Alleghany	7,734	1	7,734	30,234	
Anson	24,962	1	24,962	13,006	
Ashe	19,768	1	19,768	18,200	
Avery	12,009	1	12,009	25,959	
Beaufort	36,014	1	36,014	1,954	
Bertie	24,350	1	24,350	13,618	
Bladen	28,881	1	28,881	9,087	
Brunswick	20,278	1	20,278	17,690	
Buncombe	130,074	2	65,037		27,069
Burke	52,701	1	52,701		14,733
Cabarrus	68,137	1	68,137		30,169
Caldwell	49,552	1	49,552		11,584
Camden	5,598	1	5,598	32,370	
Carteret	30,940	1	30,940	7,028	
Caswell	19,912	1	19,912	18,056	
Catawba	73,191	1	73,191		35,223
Chatham	26,785	1	26,785	11,183	
Cherokee	16,335	1	16,335	21,633	
Chowan	11,729	1	11,729	26,239	
Clay	5,526	1	5,526	32,442	
Cleveland	66,048	1	66,048		28,080
Columbus	48,973	1	48,973		11,005
Craven	58,773	1	58,773		20,805
Cumberland	148,418	3	49,473		11,505
Currituck	6,601	1	6,601	31,367	
Dare	5,935	1	5,935	32,033	
Davidson	79,493	1	79,493		41,525
Davie	16,728	1	16,728	21,240	
Duplin	40,270	1	40,270		2,302
Durham	111,995	2	55,998		18,030
Edgecombe	54,226	1	54,226		16,258
Forsyth	189,428	3	63,143		25,175
Franklin	28,755	1	28,755	9,213	
Gaston	127,074	2	63,537		25,569
Gates	9,254	1	9,254	28,714	
Graham	6,432	1	6,432	31,536	
Granville	33,110	1	33,110	4,858	
Greene	16,741	1	16,741	21,227	
Guilford	246,520	4	61,630		23,662
Halifax	58,956	1	58,956		20,988
Harnett	48,236	1	48,236		10,268
Haywood	39,711	1	39,711		1,743
Henderson	36,163	1	36,163	1,805	
Hertford	22,718	1	22,718	15,250	

County	Population	Number of Representatives in House	Population Per Apportioned Representative	Population Change to Give Equal Representation	
				Shortage	Excess
Hoke	16,356	1	16,356	21,612	
Hyde	5,765	1	5,765	32,203	
Iredell	62,526	1	62,526		24,558
Jackson	17,780	1	17,780	20,188	
Johnston	62,936	1	62,936		24,968
Jones	11,005	1	11,005	26,963	
Lee	26,561	1	26,561	11,407	
Lenoir	55,276	1	55,276		17,308
Lincoln	28,814	1	28,814	9,154	
McDowell	26,742	1	26,742	11,226	
Macon	14,935	1	14,935	23,033	
Madison	17,217	1	17,217	20,751	
Martin	27,139	1	27,139	10,829	
Mecklenburg	272,111	5	54,422		16,454
Mitchell	13,906	1	13,906	24,062	
Montgomery	18,408	1	18,408	19,560	
Moore	36,733	1	36,733	1,235	
Nash	61,002	1	61,002		23,034
New Hanover	71,742	1	71,742		33,774
Northampton	26,811	1	26,811	11,157	
Onslow	82,706	2	41,353		3,385
Orange	42,970	1	42,970		5,002
Pamlico	9,850	1	9,850	28,118	
Pasquotank	25,630	1	25,630	12,338	
Pender	18,508	1	18,508	19,460	
Perquimans	9,178	1	9,178	28,790	
Person	26,394	1	26,394	11,574	
Pitt	69,942	1	69,942		31,974
Polk	11,395	1	11,395	26,573	
Randolph	61,497	1	61,497		23,529
Richmond	39,202	1	39,202		1,234
Robeson	89,102	2	44,551		6,583
Rockingham	69,629	1	69,629		31,661
Rowan	82,817	2	41,408		3,440
Rutherford	45,091	1	45,091		7,123
Sampson	48,013	1	48,013		10,045
Scotland	25,183	1	25,183	12,785	
Stanly	40,873	1	40,873		2,905
Stokes	22,314	1	22,314	15,654	
Surry	48,205	1	48,205		10,237
Swain	8,387	1	8,387	29,581	
Transylvania	16,372	1	16,372	21,596	
Tyrell	4,520	1	4,520	33,448	
Union	44,670	1	44,670		6,702
Vance	32,002	1	32,002	5,966	
Wake	169,082	3	56,361		18,393
Warren	19,652	1	19,652	18,316	
Washington	13,488	1	13,488	24,480	
Watauga	17,529	1	17,529	20,439	
Wayne	82,059	1	82,059		44,091
Wilkes	45,269	1	45,269		7,301
Wilson	57,716	1	57,716		19,748
Yadkin	22,804	1	22,804	15,164	
Yancey	14,008	1	14,008	23,960	

STATE SENATORIAL DISTRICTS—36 WITH 50 SENATORS

District Senatorial Data:
Proportional Representation Per Senator = $\frac{4,556,155}{50} = 91,123$

Minimum Controlling Percentage—47.1
Population Variance Ratio—2.3 to 1

District	Population of District	Percent of State's Population	Underage for Apportioned Representation	Overage for Apportioned Representation	Number of Senators	Population Per Apportioned Senator	Population Change Needed for Equal Senatorial Representation	
							Shortage	Excess
No. 1	67,990	1.492	58,570		1	67,990	23,133	
2	65,722	1.442	60,838		1	65,722	25,401	
3	73,879	1.622	52,681		1	73,879	17,244	
4	82,706	1.815	43,854		1	82,706	8,417	
5	165,844	3.640		39,284	2	82,922	8,201	
6	86,683	1.903	39,877		1	86,683	4,440	
7	81,365	1.786	45,195		1	81,365	9,758	
8	78,608	1.725	47,952		1	78,608	12,515	
9	98,132	2.154	28,428		1	98,132		7,009
10	178,533	3.919		51,973	2	89,266	1,857	
11	82,059	1.801	44,501		1	82,059	9,064	
12	181,654	3.987		55,094	2	90,827	296	
13	93,867	2.060	32,693		1	93,867		2,744
14	89,102	1.956	37,458		1	89,102	2,021	
15	148,418	3.258		21,858	1	148,418		57,295
16	195,867	4.299		69,307	2	97,934		6,811
17	181,359	3.981		54,799	2	90,680	443	
18	189,383	4.157		62,823	2	94,692		3,569
19	85,674	1.880	40,886		1	85,674	5,449	
20	89,541	1.965	37,019		1	89,541	1,582	
21	246,520	5.411		119,960	2	123,260		32,137
22	162,286	3.562		35,726	2	81,143	9,980	
23	189,428	4.158		62,868	2	94,714		3,591
24	178,642	3.921		52,082	2	89,321	1,802	
25	272,111	5.972		145,551	3	90,704	419	
26	82,817	1.818	43,743		1	82,817	8,306	
27	79,254	1.739	47,306		1	79,254	11,869	
28	98,021	2.151	28,539		1	98,021		6,898
29	97,611	2.142	28,949		1	97,611		6,488
30	127,074	2.789		514	1	127,074		35,951
31	183,678	4.031		57,118	2	91,839		716
32	102,253	2.244	24,307		1	102,253		11,130
33	92,649	2.033	33,911		1	92,649		1,526
34	71,873	1.577	54,687		1	71,873	19,250	
35	186,157	4.086		59,597	2	93,078		1,955
36	69,395	1.523	57,165		1	69,395	21,728	

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

C-168-WS-65

Interlocutory Order

RENN DRUMM, JR., ET AL, *Plaintiffs*,

v.

MALCOLM B. SEAWELL, ET AL, *Defendants*.

Upon consideration of the pleadings, evidence, briefs of counsel and oral arguments, the court, for the reasons set forth in its opinion filed herein, *Orders*

1. That the provisions of Sections 5 and 6 of Article II of the North Carolina Constitution which allocate to each County at least one Representative without respect to its ratio of representation, and the statutes of the State designated as North Carolina General Statutes 163-103, *Congressional districts specified;* North Carolina General Statutes 120-1 *Senators,* and North Carolina General Statutes 120-2 *House of Representatives* are void and of no effect for the reason that they deny to the plaintiff and others of his class the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

2. That the defendants be, and each of them is hereby restrained and enjoined from proceeding under or pursuant to the said constitutional provisions and statutes; but

3. That this injunction shall not apply to the special primary and election to fill the vacancy in the First Congressional District;

4. That the enforcement of this injunction shall be stayed until January 31, 1966, so that the Governor of North Carolina may, if he be so advised, call and convene a Special Session of the General Assembly to enact appropriate re-

apportionment statutes under the Constitution of North Carolina and the Constitution of the United States;

5. That if the Legislature does not act, or if its acts do not meet the determinations herein made, then the court will fashion a scheme of apportionment which will permit the 1966 primaries and elections to proceed on a just and equitable basis; and

6. That the jurisdiction of this action be, and it is hereby, retained for the entry of such other orders as may be necessary and proper.

(s) J. Spencer Bell
United States Circuit Judge

(s) Edwin M. Stanley
United States District Judge

(s) Algernon L. Butler
United States District Judge

November 30, 1965.

Appendix B

STATE OF NORTH CAROLINA
DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I Chad Eure, Secretary of State of the State of North Carolina, do hereby certify the following and hereto attached (Four (4) sheets) to be a true copy of Chapter 7, 1966 Extra Session Laws, the original of which is now on file and a matter of record in this office.

In Witness Whereof, I have hereunto set my hand and affixed my official seal.

Done in Office, at Raleigh, this 17th day of January in the year of our Lord 1966.

Thad Eure
Secretary of State

Seal

AN ACT TO ESTABLSH CONGRESSIONAL DISTRICTS

The General Assembly of North Carolina do enact:

Section 1. G. S. 163-103 is rewritten to read as follows:

"163-103. Congressional Districts Specified. For the purpose of nominating and electing members of the House of Representatives of the United States Congress in 1966 and every two years thereafter, there are established the following congressional districts, from each of which one representative shall be elected:

District 1 shall consist of Beaufort, Bertie, Camden, Chowan, Craven, Currituck, Dare, Gates, Hertford, Hyde, Jones, Martin, Northampton, Pamlico, Pasquotank, Perquimans, Pitt, Tyrrell, and Washington Counties.

District 2 shall consist of Edgecombe Franklin, Granville, Greene, Halifax, Johnston, Lenoir, Vance, Warren, and Wilson Counties.

District 3 shall consist of Carteret, Duplin, Harnett, Lee, Onslow, Pender, Sampson, and Wayne Counties.

District 4 shall consist of Chatham, Montgomery, Moore, Nash, Orange, Randolph, and Wake Counties.

District 5 shall consist of Caswell, Durham, Forsyth, Person, Rockingham, and Stokes Counties.

District 6 shall consist of Alamance, Davidson, and Guilford Counties.

District 7 shall consist of Bladon, Brunswick, Columbus, Cumberland, Hoke, New Hanover, Robeson and Scotland Counties.

District 8 shall consist of Anson, Lincoln, Mecklenburg, Richmond, and Union Counties.

District 9 shall consist of Alleghany, Ashe, Cabarrus, Caldwell, Davie, Rowan, Stanly, Surry, Watauga, Wilkes, and Yadkin Counties.

District 10 shall consist of Alexander, Avery, Burke, Catawba, Cleveland, Gaston, and Iredell Counties.

District 11 shall consist of Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, McDowell, Macon, Madison, Mitchell, Polk, Rutherford, Swain, Transylvania, and Yancey Counties."

Sec. 2. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 3. All laws and clauses of laws in conflict with this Act are repealed, except that G. S. 163-103 as that Section read immediately prior to the ratification of this Act shall remain in force until November 7, 1966, for the sole purpose of governing the filling of any vacancy occurring in the term of office which ends in January 1967.

Sec. 4. This Act shall take effect on February 15, 1966.

In the General Assembly read three times and ratified, this the 14th day of January, 1966.

ROBERT W. SCOTT
President of the Senate.

H. P. TAYLOR, JR.
Speaker of the House of Representatives.

Examined and found correct,
DENNIS S. COOK
For Committee.

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1128

RENN DRUM, JR., On Behalf of Himself and all Others Similarly Situated,

and

JESSE H. AUSTIN, JR., NORMAN C. DENNING, JOSEPH GRIMES, MRS. RUTH SHAW, DAVID BRADLEY, MRS. JAMES PROTHRO, HUGH M. WILSON, ROBERT S. METZGER, and MRS. DAVID I. FORT, *Appellants*,

v.

MALCOLM B. SEAWELL, Chairman of the North Carolina State Board of Elections; JOHN G. CLARK, MRS. ROBERT W. PROCTOR, HIRAM H. WARD and PAUL OSBORNE, Members of the North Carolina State Board of Elections, *Appellees*.

MOTION TO ADVANCE AND TO EXPEDITE CONSIDERATION

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v.

MALCOLM B. SEAWELL, Chairman of the North Carolina State Board of Elections; JOHN G. CLARK, MRS. ROBERT W. PROCTOR, HIRAM H. WARD and PAUL OSBORNE, Members of the North Carolina State Board of Elections, *Appellees*.

MOTION TO ADVANCE AND TO EXPEDITE CONSIDERATION

Appellants hereby apply to the Court for the advancing of their appeal by this Court and the expediting of the consideration of the appeal, with or without oral argument; and in support of their application, they respectfully show:

1. This appeal is taken from an Order of the Court below dated February 18, 1966 and an Order of March 8, 1966 denying the Petition to reconsider and rehear. The combined effect of these Orders was to declare constitutionally defective a congressional redistricting plan prepared in a January 1966 special session of the North Carolina General Assembly, but to allow use of this plan during the 1966 primaries and elections, wherein Representatives to the United States Congress will be elected to serve two year terms commencing in January 1967.

2. Appellants have proceeded promptly to perfect their appeals, and to file the Jurisdictional Statement required by the Court's rules.

3. As set forth in the Jurisdictional Statement, this appeal against the most recent redistricting plan sets forth substantial questions arising under *Swann* v. *Adams,* (No. 973), decided February 25, 1966; *Reynolds* v. *Sims,* 377 U.S. 533; and *Wesberry* v. *Sanders,* 376 U.S. 1.

4. The orders of the Court below approving a constitutionally defective interim plan and the Appellants' appeal therefrom have created substantial uncertainty among candidates for office in the United States House of Representatives and among the voters of North Carolina; and it is desirable that this uncertainty be dispelled as soon as possible and an answer provided to the substantial questions concerning the legality of allowing the interim redistricting plan.

5. The primaries to choose Congressional candidates are scheduled to take place on May 28, 1966—with runoff primaries to take place four weeks later to whatever extent such runoff primaries may be required; and the elections will occur in November 1966.

6. Unless the Appellants' appeal is advanced on the Court's calendar and receives expeditious consideration by the Court, that appeal will become moot, and the constitutional rights of the Appellants will be rendered nugatory despite their prompt and timely efforts to assert and protect those rights.

7. Failure to advance the appeal on the Court's calendar will protract existing uncertainty and thereby adversely affect the electoral process in North Carolina with respect to the election of Representatives to the United States Congress, and as a result irreparable injury will be done to the rights of the Appellants and of all other North Carolina citizens.

WHEREFORE, Appellants respectfully pray the Court to advance the Appeal on the calendar for hearing or other disposition, and to expedite the Court's consideration of the Appeal, and to take such other action as is just, including: (1) the shortening of time periods under Rule 16(1), (2) the advance of disposition of this case to a time substantially prior to the May 28, 1966 primary elections in North Carolina, (3) the dispensing of the printing and designation of record since the issues are those of law and are adequately contained in the opinions below.

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MAR 31 1966
JOHN F. DAVIS

In The

Supreme Court of the United States

October Term, 1965

No. 1128

RENN DRUM, JR., On Behalf of Himself and all Others Similarly Situated,

and

JESSE H. AUSTIN, JR., NORMAN C. DENNING, JOSEPH GRIMES, MRS. RUTH SHAW, DAVID BRADLEY, MRS. JAMES PROTHRO, HUGH M. WILSON, ROBERT S. METZGER, and MRS. DAVID I. FORT,

Appellants,

v

MALCOLM B. SEAWELL, Chairman of the North Carolina State Board of Elections; JOHN G. CLARK, MRS. ROBERT W. PROCTOR, HIRAM H. WARD and PAUL OSBORNE, Members of the North Carolina State Board of Elections,

Appellees.

On Appeal From the United States District Court For the Middle District of North Carolina

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

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In The

Supreme Court of the United States

October Term, 1965

No. 1128

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Appellees.

On Appeal From the United States District Court
For the Middle District of North Carolina

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

PRELIMINARY STATEMENT

The Appellees, believing that the matters set forth herein will demonstrate the lack of substance in the question sought to be presented by Appellants' appeal, file this statement in opposition to Appellants' Jurisdictional Statement and include their Motion to Affirm the judgment of the court below, upon the grounds that the question upon which the decision of this cause depends has been fully answered by this Court

and, therefore, the question is so unsubstantial as to obviate further argument.

PRIOR OPINIONS and PROCEEDINGS

The initial opinion in this case, rendered by the court below on November 30, 1965, is unrecorded. The court found the existing congressional apportionment unconstitutional and in its Interlocutory Order gave the State of North Carolina until January 31, 1966, to enact appropriate reapportionment statutes. On January 14, 1966, a congressional reapportionment plan was enacted and presented to the court below by the Appellees on a motion to dismiss. On February 18, 1966, the court below entered its order finding the congressional plan not in compliance with the Constitution, but allowed the primary and general election of 1966 to be held under the plan. The court required the State of North Carolina to enact a constitutional congressional plan by July 1, 1967.

On March 8, 1966, the court below denied Appellants' Motion for Rehearing.

Copies of the opinion and order of November 30, 1965, February 18, 1966, and order of March 8, 1966, are attached to the Appellants' Jurisdictional Statement as Appendices A-1, A-2 and A-3.

STATUTES INVOLVED

The provisions of § 163-103 of the General Statutes of North Carolina, enacted as Chapter 7, Extra Session 1966, on January 14, 1966, are involved in this proceeding.

QUESTION PRESENTED

Did the three-judge court below abuse its discretion by permitting the primary and general election of 1966 for United States Congressmen to proceed on an interim basis under the reapportionment plan which is found to be constitutionally defective?

STATEMENT OF THE CASE

On September 10, 1965, Appellant Drum filed his Complaint attacking the apportionment of the congressional districts and both Houses of the North Carolina General Assembly. On September 26, 1965, Defendants filed Answer and all parties agreed to expedite hearing of the case. On November 30, 1965, the three-judge court entered its opinion and Interlocutory Order declaring unconstitutional the existing apportionment of the congressional districts and both Houses of the General Assembly of North Carolina. On December 6, 1965, the Governor of North Carolina called an Extra Session of the General Assembly to meet on January 10, 1966, to consider only reapportionment of the congressional districts and both Houses of the General Assembly.

The General Assembly enacted reapportionment plans for both Houses of the General Assembly and congressional districts, and these plans were submitted to the court for hearing on February 4, 1966. On February 18, 1966, the court entered its opinion and order finding the reapportionment plans for both Houses of the General Assembly to be constitutional, but finding the congressional plan constitutionally defective.

The court below, recognizing the good faith effort of the Legislature to meet constitutional requirements and recognizing the obligation of the Federal courts to defer to the prerogative of the State Legislature in reapportionment matters and also recognizing the imminence of the 1966 primaries, exercised its equitable discretion and permitted the congressional elections for 1966 to take place under the plan passed by the Extra Session of the General Assembly.

The congressional reapportionment plan enacted by the General Assembly has a population variance ratio of 1.19 to 1, with a deviation of persons per congressman ranging from −8.91% in the smallest district to +8.39% in the largest district. The average deviation for all districts is 3.46%. The population difference between the largest and smallest district is 71,640.

A statistical analysis of the congressional plan, including map of the districts, is attached hereto as Appendices 1 and 2, respectively.

Appellants grounded their Petition for Rehearing, and this appeal upon the decision in SWANN v ADAMS, No. 973, decided February 25, 1966.

ARGUMENT

In considering the questions set forth in Appellants' Jurisdictional Statement, the Appellees contend that the substantive question involved is more accurately stated in a question propounded in abuse of discretion of the court below. Although the Appellees did not appeal from the decision of the court below finding the congressional plan constitutionally defective, the Appellees do not agree that the plan is constitutionally insufficient, but, on the other hand, contend that the congressional reapportionment plan meets the constitutional standards required under REYNOLDS v SIMS, 377 U.S. 533; 12 L. ed. 2d 506, 84 S. Ct. 1362 (and other companion cases).

The Appellees urge that the opinion and order of the court below of February 18, 1966, is in full compliance with the principles of remedial relief recognized in REYNOLDS v SIMS, *supra*. Appellees further urge that the case of SWANN v ADAMS, No. 973, decided February 25, 1966, is distinguishable and was not binding upon the court below, under the facts of this case, in the exercise of its equitable discretion.

Excerpts from Swann's brief filed in the United States Supreme Court, of which this Court may take judicial notice, reveal the history of that case as follows:

"Appellant Swann filed this action seeking reapportionment of both houses of the Florida Legislature in accordance with constitutional requirements. After final hearing the District Court on July 23, 1962, found

> " '. . . the existing provisions of the Constitution and statutes of the State of Florida which relate to the apportionment for the nomination and election of the members of the Senate and House of Representatives of the Legislature of Florida are invidiously discriminatory against the plaintiff.' SOBEL v ADAMS, 203 F. Supp. 316, 317.

"The Court found 'the constitutional and statutory provisions of the State of Florida, which provide for the apportionment and reapportionment, are null, void, and prospectively inoperative.' SOBEL v ADAMS, 208 F. Supp. 316, 318. The Court, however, refusing to do the necessary reapportioning itself, turned the matter back to the state, noting:

> " 'Should the state fail or neglect to perform this obligation with that dispatch which the urgency of the matter requires, then the less desirable reapportionment by judicial decree would be required. It seems that there is ample time for a valid reapportionment to be made and become effective prior to the time for the convening of the regular legislative session in 1963.' SOBEL v ADAMS, 208 F. Supp. 316, 318.

"A special session of the Florida Legislature was then convened, which enacted a reapportionment amendment to the Florida Constitution for submission to the electorate at the general election in November, 1962.

"At this point, in its opinion dated September 5, 1962, the District Court back-tracked from its previous opinion and found:

> " '. . . that the rationality of a legislative apportionment may include a number of factors in addition to population . . . [That] Under the plan before us the House of Representatives would be apportioned by a formula in which population is heavily weighted. Because of this we think that population need not be a major factor in the apportionment of the other House.'

"The Court concluded that if the electorate should adopt the amendment proposed,

> "'. . . the State will have then adopted a rational plan of reapportionment, free from invidious discrimination.' SOBEL v ADAMS, 208 F. Supp. 316, 321, 323, 324.

"On November 6, 1962, the voters of Florida rejected the proposed constitutional amendment. At the same time they elected state legislators for the 1963 biennial legislative session on the basis of the legislative apportionment which had previously been declared prospectively null, void and inoperative by the District Court. The following day Appellant Swann again sought relief. On November 9, 1962, another special session of the Florida Legislature convened. It failed to take any action whatsoever. On December 10, 1962, Appellant Swann again sought judicial relief. Again a special session of the Florida Legislature was convened. This time the Legislature adopted a new plan, both as a temporary statutory reapportionment and as a permanent constitutional reapportionment to be submitted to the voters in November, 1964.

"Appellant Swann on February 4, 1963, again sought judicial relief, but to no avail, for on February 7, 1963, the District Court found the statutory and constitutional reapportionment valid and compatible with the requirements of the Federal Constitution. SOBEL v ADAMS, 214 F. Supp. 811. Appellant Swann appealed to the Supreme Court.

"On June 22, 1964, the Supreme Court reversed and remanded for further proceedings 'consistent with the views stated in the Courts' opinion in REYNOLDS v SIMS and other cases relating to state reapportionment decided along with Reynolds.'

"On July 20, 1964, Appellant Swann petitioned for relief consistent with REYNOLDS v SIMS. Among other things, Appellant Swann sought to enjoin the Secretary of State of the State of Florida from placing the proposed constitutional

amendment on the ballot in November, 1964. This constitutional amendment was identical to the statutory reapportionment found unconstitutional by this Court on June 22, 1964.

"On October 21, 1964, the District Court refused to enjoin the Secretary of State of Florida from placing this constitutional amendment on the ballot, thus requiring a popular vote on an amendment which would have been unconstitutional if adopted. Nevertheless, on November 3, 1964, the voters of Florida rejected the proposed constitutional amendment by a more than two-to-one margin.

"On November 12, 1964, Appellant Swann filed another petition, pointing out that since the proposed constitutional amendment had been defeated, there was now no basis, *de jure* or *de facto,* for a 1965 legislative session inasmuch as there was neither statute nor constitutional amendment providing for a valid apportionment plan under which the Legislature could function.

"The District Court ignored all requests for a hearing and on January 8, 1965, the District Court entered an order deferring all matters raised in the petitions of either Appellant until the conclusion of the next biennial session of the unconstitutionally apportioned Legislature, which convened on April 6, 1964. The order recited that the matters deferred would be *promptly* reconsidered if the Legislature of Florida had not validly reapportioned itself by July 1, 1965, in accordance with the standards laid down by this Court.

"A special reapportionment session of the Florida Legislature was convened in June, 1965. No results were reached and on June 22, 1965, the District Court entered an order requesting all parties to the cause and amici curiae to submit reapportionment plans to the Court by July 6, 1965, and gave the Legislature until July 1, 1965, to 'validly' reapportion itself.

"On June 29, 1965, the Florida Legislature enacted House

Bill No. 19-XX calling for a 58-member Senate and a 109-member House of Representatives.

"On July 6, 1965, the Appellants filed a joint petition asking the District Court to hold the newly enacted reapportionment plan unconstitutional. Nevertheless, no action whatsoever was taken by the District Court until October 5, 1965, when the Court ordered oral argument on all pending matters for November 2, 1965.

"On December 23, 1965, the Court entered the Order here appealed from. The opinion stated in part as follows:

> " 'The apportionment made by said statute, as herein modified, is approved as an interim plan for a period ending sixty days after the adjournment of the 1967 regular session of the Florida legislature; . . .' "

It is clear that the United States Supreme Court's opinion rendered on February 25, 1966, was a recognition of the failure of the Florida Legislature and the District Court to take positive action after four years of stalling litigation.

After the February 25 decision, the Governor of Florida called the Legislature into special session on March 2, 1966, for a 10-day period. Swann filed a petition with the Three-Judge Court a few days later asking that the Court reapportion. However, the Court declined to act on the Petition, but indicated it would effect reapportionment if the legislature failed to produce a constitutional plan during the special session.

The order of February 18, 1966, allowing the primaries and general election of 1966 to be held, granted the Plaintiff the exact relief requested in his Motion to Retain Jurisdiction. Plaintiff prayed therein that the Court decree the congressional plan invalid, but allow election to be held pursuant thereto in 1966 in order for the reapportioned State Legislature in 1967 to be given an opportunity to produce a more acceptable plan. The Supplemental Brief filed by the *Amicus Curiae* requested the same remedial relief.

The question of remedial relief was considered in REYNOLDS v SIMS, 377 US 533, 585-587:

> ". . . Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by Mr. Justice Douglas, concurring in BAKER v CARR, 'Any relief accorded can be fashioned in the light of well-known principles of equity.'
>
> "We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for

> legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."

What was said in REYNOLDS was applied in WMCA, INC., v LOMENZO, 377 US 633; MARYLAND COMMITTEE v FAWES, 377 US 656; DAVIS v MANN, 377 US 678; ROMAN v SINCOCK, 377 US 695; LUCAS v COLORADO GENERAL ASSEMBLY, 377 US 713.

The federal courts have consistently followed REYNOLDS in granting state legislatures adequate time to reapportion.

It is obvious that the action of the Florida Legislature and the District Court's decisions in SWANN v ADAMS had the effect of perpetuating the invalid apportionment in that state from 1962 until 1969, a period of seven years.

No such factors appear in the present case. From the filing of Appellant Drum's Complaint on September 10, 1965, until the order of the court below on February 18, 1966, was a period of only five months and eight days. Under the order of February 18, 1966, only one election can be held under the interim plan and a period of approximately sixteen and one-half months will have elapsed before the General Assembly of North Carolina is required to enact a constitutional congressional redistricting plan.

There is no doubt that the General Assembly of North Carolina, which is now constitutionally reapportioned, will enact a valid congressional apportionment plan during the regular session of 1967, or the court below will decree a valid plan of its own motion.

CONCLUSION

For the reasons stated, Appellees respectfully urge this

Court that the court below did not abuse its equitable discretion and that its decision was based upon sound, equitable principles which have been recognized by this Court and, therefore, the opinion and order of February 18, 1966, should be affirmed.

Respectfully submitted,

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Appendix 1

STATISTICAL ANALYSIS OF NORTH CAROLINA CONGRESSIONAL DISTRICTS

Congressmen: 11
Districts: 11
Population range:

	District	*Population*	*Deviation from Average*
Largest	7	448,933	+8.39%
Smallest	3	377,293	−8.91%
Average		414,196	3.46%

Ratio of largest to smallest 1.19 to 1

NORTH CAROLINA CONGRESSIONAL DISTRICTS

District	*Population*	*Deviation*
1	384,300	−7.22%
2	419,370	+1.25
3	377,293	−8.91
4	416,477	+0.55
5	439,672	+6.15
6	411,687	−0.61
7	448,933	+8.39
8	409,759	−1.07
9	419,416	+1.26
10	409,174	−1.20
11	420,074	+1.42
Total	4,556,155	
Average	414,196	3.46%
Ratio	1.19:1	

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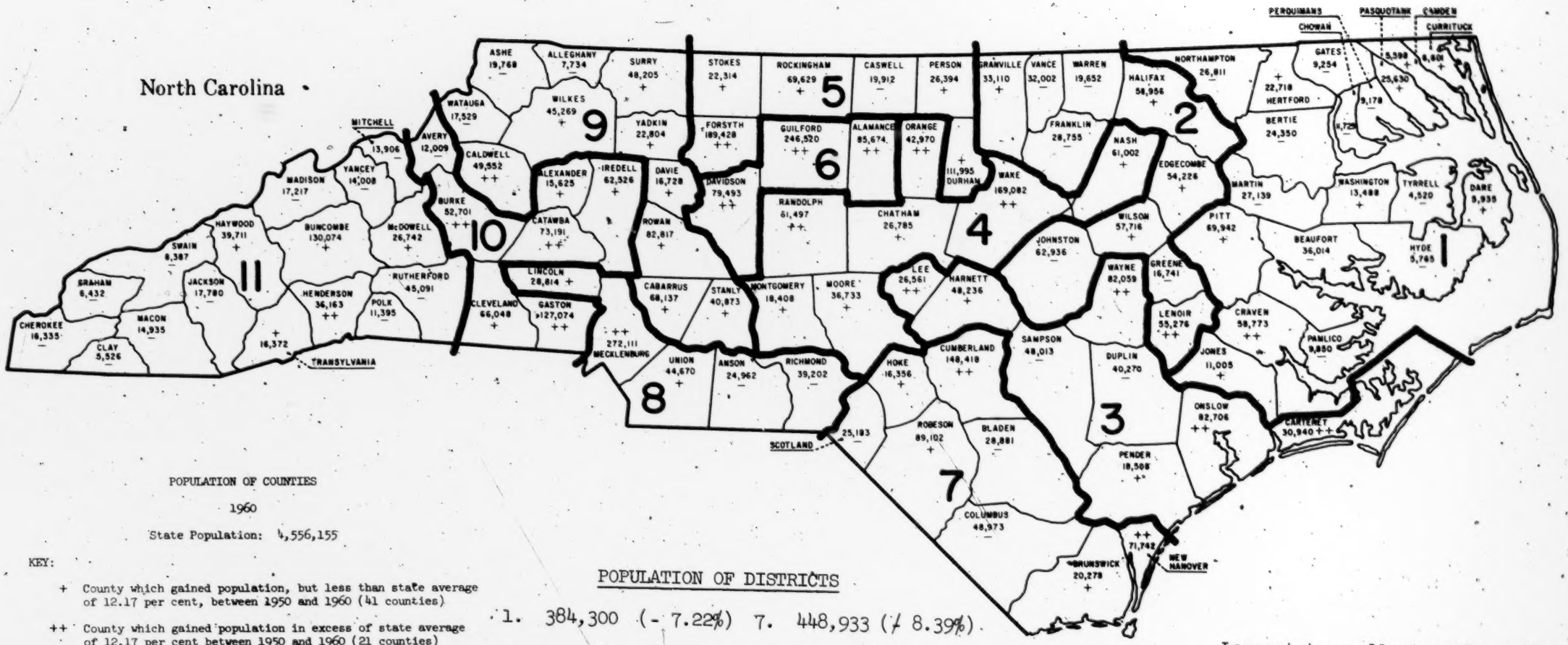
Appendix 2

CONGRESSIONAL DISTRICTS 1966 -



POPULATION OF COUNTIES

1960

State Population: 4,556,155

KEY:

\+ County which gained population, but less than state average of 12.17 per cent, between 1950 and 1960 (41 counties)

++ County which gained population in excess of state average of 12.17 per cent between 1950 and 1960 (21 counties)

\- County which lost population between 1950 and 1960 (38 counties)

POPULATION OF DISTRICTS

1.	384,300	(- 7.22%)	7.	448,933	(+ 8.39%)
2.	419,370	(+ 1.25%)	8.	409,759	(- 1.07%)
3.	377,293	(- 8.91%)	9.	419,416	(+ 1.26%)
4.	416,477	(+ 0.55%)	10.	409,174	(- 1.20%)
5.	439,672	(+ 6.15%)	11.	420,074	(+ 1.42%)
6.	411,687	(-0.61%)		4,556,155	

Largest to smallest ratio 1.19 to 1

Average deviation 3.46%

Average population per district 414,196

Session Laws 1966 (Ex. Sess.), C. 7